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# In the Supreme Court of the United States

JOHNNY PAUL PENRY,
*Petitioner,*

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,
*Respondent.*

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

## PETITIONER'S REPLY BRIEF

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## ARGUMENT IN REPLY

Petitioner ("Penry") submits this brief in reply to the respondent's brief ("Resp. Br.") and the briefs of amici curiae Justice for All ("JFA Br."), Criminal Justice Legal Foundation ("CJLF Br.") and the State of Alabama ("Ala. Br.") (collectively the "Opposing Briefs").[1/]

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[1/] In recent weeks, this Court has issued stays in two cases raising the question of whether there now exists a national consensus against executing a mentally retarded person, so that such executions are categorically prohibited by the Eighth Amendment. *See McCarver* v. *North Carolina*, No. 00-8727, 2001 WL 206050 (Mar. 1, 2001) (Mem.); *Richardson* v. *Luebbers*, No. 00-8810, 2001 WL 219434 (Mar. 6, 2001) (Mem.). Although this question was not presented by Penry's petition to this Court, it was preserved and argued by Penry in the Courts below. *See* JA 3:785-86 (Texas Court); JA 4:893-902 (District Court); JA 4:1050-51 (Court of Appeals). This Court therefore has the power, if it chooses to exercise it, to reach this question in Penry's case. *See Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 247 n.12 (1981); *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 32 (1993).

## I.

## THE OPPOSING BRIEFS FAIL TO SHOW THAT PENRY'S SECOND TRIAL COMPLIED WITH *PENRY I*

As Penry's brief on the merits demonstrates, the procedure followed in this case violated *Penry I* by requiring the jury to answer the same three questions which, as the *Penry I* Court held, gave the jury insufficient scope to consider Penry's mental retardation and child abuse. (Petitioner's Brief ("Pet. Br.") at 12-21) The only possible escape from this conclusion would be to label the trial court's instruction, as the Texas Court of Criminal Appeals did, a "nullification instruction" -- one which told the jury that it could give false answers to the questions asked. As Penry's prior brief also demonstrates, such a nullification instruction, if given, would be unconstitutional under *Roberts* v. *Louisiana*, 428 U.S. 325 (1976). (Pet. Br. at 21-23)

Respondent and its allied amici seek to find some middle ground -- to show that the instruction neither limited the jury to the questions asked, nor told the jury to nullify. But there is no middle ground, and as a result, the Opposing Briefs take confusing and contradictory positions. Indeed, they seem to agree only in admitting that the trial court's instruction was flawed (while insisting the flaw was not of constitutional magnitude). Respondent calls the instruction "less than artful" (Resp. Br. at 17) and two of the amici agree: "perhaps not perfect in every detail" (Ala. Br. at 19); "not the optimum way to write instructions." (CJLF Br. at 15)

Two of the Opposing Briefs say, in substance, both that the instruction was not a nullification instruction and that it was.



Respondent's brief states that "the jury was not instructed to disregard the law, the instructions, their oath, or the evidence" but also that the instruction told the jury to render a decision "regardless of its initial answers to the questions." (Resp. Br. at 11, 16) The Criminal Justice Legal Foundation criticizes the Texas Court of Criminal Appeals for a "poor choice of words" in speaking of a "nullification instruction," but then goes on to imply that the instruction directed an answer "different from the answer to the bare question." (CJA Br. at 16, 17) Thus, both briefs describe what the instructions did in words that could serve to define the term "nullification." Another amicus argues that the instruction could be read as nullifying or not -- as either "broadening the special issues . . . or as a type of 'nullification instruction'." (Ala. Br. at 24) A third amicus argues that there was not, and did not need to be, any instruction to nullify, but does not address the question of why the Texas Court of Criminal Appeals apparently thought otherwise. (JFA Br. at 11-13)

Thus, it is impossible to glean from the Opposing Briefs a consistent view of how the Texas court's instruction supposedly cured the *Penry I* error: Did it do so by altering the meaning of the questions, or by telling the jury to ignore them? The briefs of respondent, the Criminal Justice Legal Foundation and the State of Alabama argue primarily for the former (Resp. Br. at 11, 16; CJLF Br. at 14-15; Ala. Br. at 24), though at places they argue inconsistently for the latter position as well (Resp. Br. at 16; CJLF Br. at 15, 17; Ala. Br. at 20, 24). Justice for All, by contrast, embraces the latter view, arguing that the question of whether Penry acted "deliberately" gave the jury sufficient scope to consider mitigating evidence. (JFA Br. at 11-14) It is fair to ask how the jury was supposed to understand the trial court's instruction if the authors of the Opposing Briefs cannot agree on what it means.

The source of the Opposing Briefs' confusion is that they are struggling to do the impossible: to reconcile the procedure the Texas court followed with *Penry I*. Indeed, the Opposing Briefs repeatedly concede that it was difficult, if not impossible, for the trial court to comply with *Penry I* without departing from the Texas statutory scheme. Respondent notes that the state was in a "difficult position," because Penry's second trial began before the Texas legislature could meet to correct the statute. (Resp. Br. at 12) The State of Alabama notes that "*Penry I* did not explain how a Court could instruct a jury to give effect to its 'reasoned moral response' (giving the jury discretion to consider a broad range of mitigating evidence) in the context of the Texas statute . . . ." (Ala. Br. at 23) And Justice for All appears to reargue *Penry I*, insisting that the first special issue in the old Texas statute -- "even without the additional instruction given in this case" -- gave the jury broad scope to consider mitigating evidence. (JFA Br. at 11-12) Justice for All's argument flatly contradicts the holding of *Penry I*:

> In the absence of jury instructions defining "deliberately" in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue.

492 U.S. at 323. The Opposing Briefs thus reinforce the conclusion that the Texas statute, as the Texas court applied it here, and the *Penry I* decision are not reconcilable.



As the above-quoted language shows, the *Penry I* Court effectively invited the Texas courts to comply with its holding through a definition of the term "deliberately." Why the trial court in this case did not take up that invitation is a mystery on which the Opposing Briefs shed no light. Absent such a definition, it is clear from *Penry I* that the Texas statute, as applied to this case, was on a collision course with the Eighth Amendment to the United States Constitution -- and of course it is the statute, not the Constitution, that must give way. The Texas court failed to accept this principle, and thus repeated the *Penry I* error.

As Penry's brief on the merits points out, the Texas legislature eventually amended its statute to conform to the dictates of *Penry I* by providing for a question specifically directed at mitigating evidence. (Pet. Br. at 6) The result -- a situation in which the *Penry I* decision is applied to every Texas capital defendant except Penry -- is so blatantly unjust that one of the Opposing Briefs pays a left-handed compliment to its "emotional appeal." (JFA Br. at 14) But this amicus brief insists that the added question called for in the new Texas statute "simply is not ***required*** by the federal Constitution" (JFA Br. at 15; emphasis in original) and that Texas has chosen to give juries "even wider discretion" than *Penry I* commands. (*Id.* at 16) It is obvious, however, that the Texas legislature was not acting out of an impulse to be generous to capital defendants when it amended the statute. It was attempting to conform to the ruling of this Court. The legislative history is clear on this: It states that the "[p]urpose" of the bill is to give "effect to the Supreme Court's decision in Penry." Texas Senate, Committee on Criminal Jurisprudence, Bill Analysis, S.B. 80 C.S.S.B. 880.

Texas gave effect to the *Penry I* decision too late - too late to benefit Penry himself. The conduct of Penry's second trial was in blatant violation of *Penry I*.

## II.

## THE OPPOSING BRIEFS FAIL TO SHOW THAT THE ADMISSION OF THE PEEBLES REPORT WAS EITHER CORRECT UNDER *ESTELLE* V. *SMITH* OR HARMLESS ERROR

### A. The Opposing Briefs Ignore the Question on Which this Court Granted Certiorari

The Petition for Certiorari that this Court granted stated the *Estelle* v. *Smith* question as follows:

> Is a psychiatrist appointed by the Court on motion of defense counsel, whose report is used as evidence for the prosecution, an "agent of the state" for purposes of the Fifth Amendment holding of *Estelle* v. *Smith*?

This question directly addresses the issue that the Court of Appeals for the Fifth Circuit and the Texas Court of Criminal Appeals decided: as the Fifth Circuit stated, the Texas court held that there was "no Fifth Amendment violation because Penry's attorney had requested the examination; thus, Dr. Peebles was acting as an agent of the defense, not of the State," and the Fifth Circuit deferred to that holding. (JA 4:1048-49)

Amazingly, in the 30 pages of argument which the Opposing Briefs devote to the *Estelle* v. *Smith* issue, there is *not*



*one word* that defends the lower courts' "agent of the State" rationale. The question which this Court granted certiorari to decide is mentioned in the Opposing Briefs only to criticize Penry for bringing it up: Respondent devotes a footnote to the subject, in which it states that Penry's "focus" on the issue is "entirely myopic" (Resp. Br. at 27 n.11), while one amicus asserts that Penry's discussion of this issue is "largely beside the point." (JFA Br. at 16)

It could hardly be plainer, we respectfully submit, that the "agent of the State" theory adopted by the Texas Court of Criminal Appeals, to which the Court of Appeals for the Fifth Circuit deferred, is, for the reasons Penry has already stated, either contrary to or an unreasonable application of *Estelle* v. *Smith*. (Pet. Br. at 28-32) If there were something to be said for the Texas court's holding, surely one of the four skilled advocates who authored the Opposing Briefs would say it.

### B. The *Buchanan* Exception to *Estelle* v. *Smith* Does Not Apply

Abandoning the rationale of the Texas courts and the Court of Appeals, all of the Opposing Briefs argue that this case is within the "rebuttal" exception to *Estelle* v. *Smith* established by *Buchanan* v. *Kentucky*, 483 U.S. 402 (1987). (Resp. Br. at 27-31; JFA Br. at 16-19; CJLA Br. at 28-30; Ala. Br. at 16 n.4) But, as Penry's brief on the merits demonstrates, *Buchanan* is inapplicable, because the report of Dr. Peebles was not a "rebuttal" to any mental status evidence that Penry presented. (Pet. Br. at 34-37) The Opposing Briefs say nothing that alters this conclusion.

The most extensive *Buchanan* arguments are made in the briefs of respondent and Justice for All, which take different approaches.[2/]

1. Respondent's Argument

Respondent initially summarizes *Buchanan* in ridiculously overbroad terms, stating, without citation to authority, that "a defendant who uses psychiatric evidence at trial waives his right to exclude other, admissible psychiatric evidence." (Resp. Br. at 27) Respondent then proceeds to misstate the record, asserting that the Peebles report rebutted the testimony of the defense psychologist, Dr. Price, and the mental health records offered by the defense. (Resp. Br. at 27-31) Respondent says that there was a dispute between Dr. Price and prosecution witnesses as to whether Penry's conduct was attributable to mental retardation and child abuse, or to an antisocial personality, and it quotes the testimony of the State's rebuttal experts as contradicting that of the defense. (Resp. Br. at 29) Tellingly, however, the State does not quote a word from the Peebles report, for the Peebles report simply does not support the prosecution's side of this debate. It does not suggest, either in words or substance, that Penry's conduct was attributable to antisocial personality disorder. On the contrary, Dr. Peebles' diagnosis and that of the defense psychologist, Dr. Price, were essentially identical; both explained that Penry's mental retardation was a contributing factor to his antisocial

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2/ The Criminal Justice Legal Foundation makes a *Buchanan* argument similar to that of Justice for All. (CJLF Br. at 28-30) The State of Alabama merely asserts that *Buchanan* is applicable. (Ala. Br. at 16 n.4)



behavior. Their descriptions of Penry's mental state are virtually interchangeable:

| Peebles Report | Testimony of Dr. Price |
|---|---|
| [H]e is moderately retarded and his judgement and insight are moderately to severely impaired. He also has some antisocial features which account for him not learning by his past mistakes and making some of the same mistakes over again. (JA 1:59)<br><br>A person of this sort who is moderately mentally retarded does not comprehend properly what is going on around him and frequently responds inappropriately. Another thing that is disturbing is antisocial features which he has exhibited consisting | [B]rain impairment of this type, causes the person problems in areas such as the individual, if they can control themselves, impulse control, with these things, about tolerance, it decreases that. It effects their judgment and their ability to reason. The ability to make smart decisions for themselves, and others and in general, the brain impairment can cause a certain degree of instability behavior, and indirectly, those things are some of the very things that are involved in criminal activities. (JA 2:284) |

| Peebles Report | Testimony of Dr. Price |
|---|---|
| of the apparent inability to love or be loved, to make lasting friends, to develop adequate interpersonal relationships, lack regret for past offenses. He also has not learned from his mistakes and is likely to continue making some of his same mistakes over again. (JA 1:60) | [T]he extent of mental retardation and brain impairment are substantial factors in the development of anti-social behavior in Johnny Paul Penry. (JA 2:414) |

Thus, respondent is simply wrong in arguing that the Peebles report rebutted the testimony of the defense expert as to the cause of Penry's conduct. The only significance of the Peebles report to the State's case was as evidence of future dangerousness. As Penry's brief on the merits demonstrates, the statement in the Peebles report on that issue was not rebuttal. (Pet. Br. at 34-37)

2. Justice for All's Argument

Justice for All argues that the Peebles report was rebuttal simply by discarding the ordinary meaning of the word "rebuttal" and inventing a new one. This amicus says that Peebles' statement about Penry's dangerousness rebuts the mitigating evidence of his mental retardation because it serves "to emphasize another aspect" of Penry's retarded condition. (JFA Br. at 18) In substance, Justice for All's argument is that it constitutes "rebuttal" for the State to say: "Yes, he is retarded, and that makes him all the more dangerous." (JFA Br. at 16-19)



This logic is flawed in two ways. First, the Peebles report merely states the conclusion that Penry is dangerous -- it does not present his dangerousness as "another aspect" of his mental retardation. Secondly, *Buchanan* does not permit "rebuttal" in this indirect and attenuated form. Justice for All's definition of "rebuttal" would essentially vitiate *Estelle* v. *Smith*, for, as the Justice for All brief illustrates, there is little limit to what imaginative counsel can characterize as "rebuttal"evidence in this broad sense.

"Rebut" means, according to the American Heritage Dictionary, "to refute, esp. by offering opposing evidence or arguments." *American Heritage College Dictionary* 1139 (3d ed. 1993). In the *Buchanan* context, "rebuttal" means that, if a defendant tries to prove something using mental status evidence, the prosecution may use mental status evidence to prove the contrary. *Buchanan* itself illustrates the point: the defendant in that case sought to rely upon reports of mental health professionals to establish a defense of "extreme emotional disturbance." 483 U.S. at 408. In response, the prosecution introduced a report from a doctor who had examined the defendant and found him to behave normally and appropriately, with no extreme hostility, intact memory, no hallucinations or delusions, and no thoughts of suicide. *Buchanan*, 483 U.S. at 412 n.12. This Court held that *Estelle* v. *Smith* was not violated when the doctor's report was used "for this *limited* rebuttal purpose." 483 U.S. at 424 (emphasis added). The report in *Buchanan* was redacted to remove material that was not a rebuttal to the defendant's claims. 483 U.S. at 423 n.20.

We are aware of no case, and the Opposing Briefs cite none, where the meaning of "rebuttal" has been stretched in the way Justice for All suggests -- to make anything "rebuttal" which brings out "another aspect" of the defendant's mental

state. Indeed, in *United States* v. *Byers*, 740 F.2d 1104 (D.C. Cir. 1984) (*en banc*), a case preceding *Buchanan* and relied on in the *Buchanan* decision, the District of Columbia Circuit Court of Appeals, in an opinion by then Circuit Judge Scalia that was joined by then Circuit Judge Ginsburg, made clear that "rebuttal" was being used in its ordinary meaning, not the unprecedented one that Justice for All advances: "[o]rdinarily, the only effective rebuttal of psychiatric opinion testimony is *contradictory opinion testimony*." 740 F.2d at 1114 (emphasis added); *see also Buchanan*, 483 U.S. at 423 (citing *Byers*).[3/]

* * *

The attempt in the Opposing Briefs to fit the Peebles report within the *Buchanan* exception is an afterthought, intended to rescue the prosecution from the trial court's grievous *Estelle* v. *Smith* error. The report was not used at trial to rebut the defense case, that mental retardation was a mitigating factor, but to advance the prosecution's case that Penry would be dangerous in the future. None of the courts that have upheld Penry's conviction characterized the Peebles report

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3/ The Justice for All brief incorrectly asserts, in support of its *Buchanan* argument, that the defense expert, Dr. Price, "testified that he had relied on the [Peebles] report in forming his opinions." (JFA Br. at 18-19; *see also* Resp. Br. at 26; CJLF Br. at 28.) In fact, Dr. Price testified merely that he had relied in general on the records of Penry's mental condition maintained by the Texas Department of Mental Health and Mental Retardation. (JA 2:345-46) The Peebles report was in this collection of documents, but Dr. Price was never asked whether he relied on it specifically, and he did not refer to it in support of any of his conclusions.



as "rebuttal" -- although they did uphold the admission of other prosecution evidence as proper "rebuttal" evidence under *Buchanan*. (JA 3:764-66; JA 4:919; JA 4:1045-46) Both the Texas court and the Court of Appeals obviously recognized that the Peebles report will not fit into the *Buchanan* category. Those courts instead adopted the "agent of the State" theory articulated in their opinions -- a theory which has found no defenders in this Court.

### C. The Opposing Briefs' Other Attempts To Distinguish *Estelle* v. *Smith* Are Unsuccessful

The briefs of respondent and two amici, in addition to relying on *Buchanan*, argue that *Estelle* v. *Smith* is factually distinguishable from the present case. Their approach is essentially to list facts present in *Estelle* v. *Smith* not present here. (Resp. Br. at 24-26; Ala. Br. at 10-16; CJLF Br. at 23-28) They fail to demonstrate, and sometimes make no serious effort to demonstrate, that those factual differences should change the result. They seem to imply, rather, that *Estelle* v. *Smith* should be limited to the specific facts of that case -- a holding which would amount to overruling *Estelle* v. *Smith sub silentio*.

The "distinguishing" facts on which the Opposing Briefs place most emphasis are that: (1) the examination by Dr. Peebles was requested by Penry's counsel; and (2) the Peebles examination occurred in connection with a prior offense, not the one involved in this case. Both these purported distinctions are wholly without substance.

Penry's brief on the merits demonstrates that the request of defense counsel for an examination is irrelevant for *Estelle* v. *Smith* purposes, since it neither prevented Dr. Peebles from being an "agent of the State" nor amounted to a waiver of

Penry's Fifth Amendment rights. (Pet. Br. at 28-37) None of the Opposing Briefs responds to these arguments, or attempts to support either an "agent of the State" or a "waiver" theory. Nor do they advance any other theory that would make the motion of defense counsel relevant.

It is also clearly irrelevant that Penry was in custody for an earlier and different offense when Dr. Peebles examined him. It has long been well established that Fifth Amendment protections are not "case specific": involuntary statements made in the context of one prosecution may not be used against a defendant in another. *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979) ("[A] defendant's compelled statements . . . may not be put to any testimonial use whatever against him in a criminal trial."); *Mincey* v. *Arizona*, 437 U.S. 385, 398 (1978) ("[A]ny criminal trial use against a defendant of his involuntary statement is a denial of due process of law"); *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 94 (1964) ("The privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory, and it protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used"). It has apparently always been assumed -- without even a need for discussion -- that this rule applies in the *Estelle* v. *Smith* context.

One example of this is *Buchanan* v. *Kentucky*, 483 U.S. 402 (1987), the case on which the Opposing Briefs rely for their "rebuttal" theory. The report at issue in *Buchanan* was prepared when Buchanan was in custody, prior to the crime involved in the *Buchanan* case, "[a]s a result of a previous arrest on a burglary charge." *Buchanan*, 483 U.S. at 409 n.9. If that fact sufficed to make *Estelle* v. *Smith* inapplicable, then the whole rebuttal analysis of *Buchanan* was unnecessary. *See also*



*Granviel* v. *Lynaugh*, 881 F.2d 185, 190 (5th Cir. 1989) (Fifth Amendment applied to testimony of doctor who had examined defendant "five years prior to Granviel's crime").

Not all of the Opposing Briefs seem even to argue that the factual differences they rely on between this case and *Estelle* v. *Smith* are valid distinctions. The State of Alabama and the Criminal Justice Legal Foundation seem, rather, to argue that the mere existence of factual differences is enough to preclude federal habeas corpus review, under 28 U.S.C. § 2254(d). (Ala. Br. at 7-16; CJLF Br. at 23-30) The State of Alabama specifically asks this Court to revisit its decisions in last term's two cases entitled *Williams* v. *Taylor*, 529 U.S. 362 (2000), and 529 U.S. 420 (2000), and to adopt new and more stringent tests -- the gist of which is that virtually any factual difference between a case on habeas corpus and the Supreme Court precedent relied on would require denying the writ. (Ala. Br. at 1-4) If the Court were to follow the approach suggested by the State of Alabama, it would come very close to abolishing federal habeas corpus jurisdiction.

There is, in fact, nothing in this case or in the Court's recent holdings in the *Williams* cases that calls for such major surgery. Penry has demonstrated -- and the failure of the Opposing Briefs to defend the decisions under review confirms -- that this case is "materially indistinguishable" from *Estelle* v. *Smith* or that, at best, the way in which the Texas courts applied *Estelle* to these facts was "unreasonable." Under Section 2254(d) as interpreted in *Williams* v. *Taylor*, 529 U.S. 362 (2000), the *Estelle* v. *Smith* error requires that a writ of federal habeas corpus be granted.

D. The *Estelle* v. *Smith* Error Was Not Harmless

Three of the Opposing Briefs contend that the admission of the Peebles report was at most harmless error under *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), in that it had no "substantial and injurious" effect on the verdict that sentenced Penry to death. (Resp. Br. at 31-32; JFA Br. at 19-20; CJLF Br. at 29 n.2) The prosecutor who tried this case for the State, however, obviously thought otherwise. He chose the Peebles report, out of all the other pieces of evidence in the case, for the climax of his lengthy closing argument. The jury had previously heard the key sentence in the Peebles report -- "It is my further professional opinion, that if Johnny Paul Penry were released from custody, that he would be dangerous to other persons" -- because the prosecution had seized the opportunity to read it aloud as soon as the report was admitted into evidence. (JA 2:413) The prosecutor now read it again just before the jury retired, informing the jury that Dr. Peebles "made an additional finding that was really out of the ordinary" and adding, "I have never seen this in any kind of a report." (JA 3:668) If this piece of evidence was "harmless" and not "injurious" to Penry, then the judgment of this able prosecutor was very poor.

In fact, the prosecutor judged correctly that few pieces of evidence could be more effective in producing a verdict of death. In assessing the impact of the Peebles report, it is important to remember that, under this Court's decision in *Penry I*, the jury was required to do more than simply answer yes or no to the question of whether Penry was dangerous. It was supposed to decide whether, under all the circumstances -- including the very powerful mitigating evidence of mental retardation and child abuse that Penry presented -- death was the appropriate sentence. The prosecutor well knew the best way to persuade the jury to ignore Penry's mitigating evidence: it



was to frighten the jury as much as possible with the specter of a dangerous man in their community.

Since the jury was determining, not merely *whether* Penry would be dangerous in the future, but *how much weight* to give to his dangerousness, every piece of evidence that pointed in the direction of dangerousness was significant, and not, as the Opposing Briefs suggest, merely cumulative. And, as the prosecutor recognized, the Peebles report was much more significant than most. The State had called other mental health experts to give live testimony on future dangerousness and other issues, but those witnesses were cross-examined vigorously, and their credibility may well have been damaged in the jury's eyes. *See* JA 2:490-527 (cross-examination of Dr. Quijano); JA 3:558-92 (cross-examination of Dr. Samenow). The prosecutor thus chose to rely on an expert who had not been and could not be cross-examined, and to drive home to the jury the "professional opinion" of that expert "that if Johnny Paul Penry were released from custody . . . he would be dangerous to other persons." (JA 3:668)

Moreover, Dr. Peebles' comment on Penry's dangerousness appears, on the face of his report, to have been volunteered for no apparent reason -- as though Dr. Peebles found Penry so terrifying that he could not refrain from commenting. Dr. Peebles thus appeared to the jury not as a partisan prosecution witness, but as an impartial professional motivated by civic duty. That is the point the prosecutor made in saying to the jury: "That was really out of the ordinary . . . I have never seen this in any kind of a report. He just added it." (JA 3:668)

In *Satterwhite* v. *Texas*, 486 U.S. 249 (1988), this Court held that evidence from a psychiatrist concerning future

dangerousness was not harmless error under the test set forth in *Chapman* v. *California*, 386 U.S. 18 (1967). In *Satterwhite*, a state psychiatrist (Dr. Grigson) conducted a psychiatric examination in violation of the defendant's Sixth Amendment right to counsel as set forth in *Estelle* v. *Smith*. *See* 486 U.S. at 255-56. At the penalty phase the state, having already proved that the defendant had committed a vicious murder, introduced the following further evidence of future dangerousness:

> Satterwhite had four prior convictions of crimes ranging from aggravated assault to armed robbery. Eight police officers testified that Satterwhite's reputation for being a peaceful and law-abiding citizen was bad, and Satterwhite's mother's former husband testified that Satterwhite once shot him during an argument.

486 U.S. at 259. The State also presented the expert testimony of Dr. Betty Lou Schroeder, a psychologist. *See id.* "Dr. Schroeder testified that she found Satterwhite to be a 'cunning individual' and a 'user of people,' with an inability to feel empathy or guilt. She testified that in her opinion, Satterwhite would be a continuing threat to society through acts of criminal violence." *Id.*

Dr. Grigson testified similarly; he said that Satterwhite would "present a continuing threat to society by continuing acts of violence," had "a lack of conscience" and was "as severe a sociopath as you can be." *Id.* Though there was a wealth of evidence of future dangerousness, the State chose to highlight Dr. Grigson's testimony in its closing argument. The *Satterwhite* Court, noting Dr. Grigson's "qualifications as a medical doctor" and the "powerful content of his message," *id.*, and pointing out that the prosecution "placed significant weight



on his powerful and unequivocal testimony" in closing argument, *id.* at 260, held that the *Estelle* v. *Smith* error was not harmless.

It is true that *Satterwhite* is not directly controlling here, because it applied the *Chapman* standard of harmless error, under which the prosecution must prove beyond a reasonable doubt that constitutional error did not contribute to the verdict. But *Satterwhite* was not a close case: the Court there was unanimous in rejecting the claim of harmless error. And this case is even less close than *Satterwhite*. As pointed out above, Dr. Peebles, unlike Dr. Grigson, was immune from cross-examination; and he could be, and was, presented to the jury not as a hired gun, but as an impartial professional so appalled by Penry's dangerousness that he could not refrain from speaking of it.

The record provides no basis for concluding that the Peebles report did not have a "substantial and injurious effect" on the verdict sentencing Penry to death.

## CONCLUSION

For the foregoing reasons and those stated in Penry's brief on the merits, the judgment of the Court of Appeals should be reversed and Penry's death should be vacated.

Respectfully submitted,

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